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HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

No. ...634

THE AETNA CASUALTY & SURETY COMPANY,

Petitioner,

*against*

RUBY MAE PITTS,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BENJAMIN H. SIFF,
Of Counsel.

## INDEX


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Statutes Involved | 2 |
| Statement | 2 |
| Specification of Errors | 6 |
| Reasons for Granting the Writ | 7 |
| Argument in Support of the Above | 7 |
| Conclusion | 10 |
| Appendix | 11 |
| Opinion By the United States Court of Appeals | 13 |
| Judgment | 20 |
| Sec. 167, Liability Insurance | 22 |


### Cases Cited


| | |
|---|---|
| Allan v. German American Insurance Co., 123 N. Y. 6 | 8 |
| Bazar v. Great American Indemnity Company, 306 N. Y. 481 | 7, 9 |
| Clinchy v. Grandview Dairy, 283 N. Y. 39, 43 | 8 |
| Gullo v. Commercial Casualty Insurance Company, 226 App. Div. 429 | 4 |
| Haas Tobacco Co. v. American Fidelity Co., 226 N. Y. 343 | 4 |

PAGE

Notthelfer v. American Surety Company, 277 App. Div. 1009, aff'd 302 N. Y. 910 ..... 7

Quinlan v. Providence Washington Insurance Company, 133 N. Y. 356 ..... 4

Reina v. United States Casualty Company, 228 App. Div. 108, 256 N. Y. 537 ..... 4

Rushing v. Commercial Casualty Insurance Company, 251 N. Y. 302 ..... 4

Vanderbilt v. Indemnity Insurance Company of North America, 265 App. Div. 495 ..... 4

Wetherwax v. Royal Indemnity, 250 N. Y. 281 ..... 7

Woolverton v. Fidelity Casualty Co., 190 N. Y. 41 .. 4

STATUTE CITED

Insurance Law of the State of New York:

Section 167, subdivisions 1(a), (b), (c), (d), 7(a) ..... 2,7

In the

# Supreme Court of the United States

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The Aetna Casualty & Surety Company,

Petitioner,

*against*

Ruby Mae Pitts,

Respondent.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

William S. O'Connor, counsel on behalf of The Aetna Casualty & Surety Company, prays for a writ of certiorari to be issued to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Southern District of New York entered against the petitioner on the 24th day of March, 1954 in an action brought pursuant to Section 167 of the New York State Insurance Law.

### Opinion Below

The District Court (Dimock, J.) wrote no opinion. The opinion of the Court of Appeals (Frank, J.) with Clark, C.J. and L. Hand (R., pp. 132-141) is not yet reported. L. Hand, J., wrote a concurring opinion (R., p. 141).

## Jurisdiction

The judgment of the Court of Appeals was entered on December 8, 1954 (R., p. 123). A timely petition for rehearing was filed on December 22, 1954 (R., p. 122) and was denied by the Court of Appeals on January 3, 1955 (R., p. 151). The jurisdiction of this Court is invoked under Section 1254, Title 28, of the United States Code.

## Question Presented

Whether in the face of an unbroken line of decisions by the highest court of New York that in actions involving the issue of coverage under liability insurance policies the insurer is entitled to timely written notice of an accident as an absolute condition precedent to coverage, a statute, which does not purport to change or alter the rule in the slightest may be so construed as to abolish it altogether.

## Statutes Involved

The statutes involved are subdivisions 1(a), (b), (c) (d) and 7(a) of Section 167 of the Insurance Law of the State of New York set forth in the Appendix, pp. 11ff, *infra*.

## Statement

The facts are not disputed and can be summarized briefly.

Plaintiff was struck by an automobile and injured on August 6, 1952. The automobile was owned by one Hartford Wiley, who was insured against liability by the petitioner, The Aetna Casualty & Surety Company. He did not notify the petitioner of the accident until more than 5 weeks later, giving that notice only after he was sued,

or at least threatened with suit. The circumstances were the following:

After the accident, plaintiff retained Mr. Jules Chopak as her attorney on August 14, 1952 (39, 98)*. When Mr. Chopak learned that Hartford Wiley was the owner of the vehicle involved in the accident he sent him a claim letter on September 4, 1952 (114, Deft.'s Exh. A). Receiving no response, Mr. Chopak sent Wiley another claim letter, dated September 9, 1952 (Pltff.'s Exh. 5), and at the same time prepared a summons and complaint (59). Neither claim letter requested Wiley to communicate with his insurance company. Again no response was received (119, 120). On September 17th, the summons and complaint were served on Wiley (Pltff.'s Exh. 7).

The first time that the insurance company knew of the accident was on September 17, when it received a letter from *Wiley's broker,* one Griffith, dated September 11, 1952, which stated that a claim was being made by Miss Pitts for injuries sustained in an accident on August 6th (Deft.'s Exh. B), and enclosing Mr. Chopak's claim letter which had been addressed to Wiley, together with a copy of a motor vehicle report prepared by Wiley on September 10, 1952, the day before Griffith forwarded the claim letter to the insurance company (Pltff.'s Exh. 13). Petitioner's mailing department received the letter and the enclosures on September 17th (185), the documents came to the attention of the Claims Division on September 19th (182). On that day, too, the summons and complaint that had been served on Wiley on September 17th was transmitted by Wiley's broker to the insurance company (194). There was a dispute whether the claim letter had not in fact been received by the company on September 11. On any view of the evidence, at least five weeks had elapsed from the date of the accident before petitioner received any kind of information from anyone that there had been an accident.

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* Numbers in parentheses refer to folios.

Petitioner requested an extension of time to answer or otherwise move with respect to the complaint (Pltff.'s Exh. 8). Wiley was finally interviewed on October 1st (190), and it was ascertained that there was no excuse for his complete failure to notify the insurance company of the accident that had occurred on August 6th more than five weeks earlier. This is undisputed. Thereupon, Wiley was advised that coverage was disclaimed (190, 191 (Pltff.'s Exh. 11)).

Thereafter, Miss Pitts prosecuted her action against Wiley to judgment, and the judgment having been unsatisfied, instituted an action against petitioner pursuant to Section 167, subdivision 7 (a) of the Insurance Law. (See Appendix, p. 12, *infra.*)

The basic issue in this case was whether the notice conditions of the policy had been complied with.

The policy condition, breach of which led to disclaimer of coverage, reads in part as follows (Plaintiff's Exhibit 10, Paragraph 2 of Conditions):

> "When an accident occurs, written notice shall be given by or on behalf of the injured to the company or any of its authorized agents as soon as practicable."

Plaintiff fully appreciated that Wiley's unexcused failure to give notice until five weeks after the accident was, under the New York law, a fatal breach of the notice conditions of his policy. *Rushing* v. *Commercial Casualty Insurance Company,* 251 N. Y. 302; *Reina* v. *United States Casualty Company,* 228 App. Div. 108, 256 N. Y. 537; *Haas Tobacco Co.* v. *American Fidelity Co.,* 226 N. Y. 343; *Vanderbilt* v. *Indemnity Insurance Company of North America,* 265 App. Div. 495; *Gullo* v. *Commercial Casualty Insurance Company,* 226 App. Div. 429; *Woolverton* v. *Fidelity Casualty Co.,* 190 N. Y. 41; *Quinlan* v. *Providence Washington Insurance Company,* 133 N. Y. 356.

For that reason she pleaded in her complaint that Wiley's neglect was immaterial because *she* gave notice to the insurance company as soon as it was practicable for her to do so (11), relying on Section 167, subdivision 1-c of the Insurance Law which provides that a policy of liability insurance must contain:

> "* * * a provision that notice given by or on behalf of the insured, or written notice by or on behalf of the injured person or any other claimant, to any licensed agent of the insurer in this state, with particulars sufficient to identify the insured, shall be deemed notice to the insurer."

Admittedly, no written communication of any kind was ever sent by Mr. Chopak, or by his client, or anyone connected with either, to the petitioner insurance company or to any of its licensed agents. Mr. Chopak testified (114-117):

> "Q. Did you ever write a letter, Mr. Chopak, on behalf of your client, or ever direct anyone to write a letter on behalf of your client to the defendant insurance company or any of its licensed agents? A. Only indirectly.
>
> "Mr. Williamson: I ask that the question be answered yes or no * * *.
>
> "The Court: The question can be answered yes or no.
>
> "The Witness: And then I answer, no.
>
> "Q. Did you ever write a letter, Mr. Chopak, to Hartford Wiley, asking him if he happened to have insurance, to turn the letter over to the insurance company that he had covering his car? A. No.
>
> "Q. So the only written communication that you ever wrote is this plaintiff's exhibit 5, and another letter you state was written on September 4th, is that right? A. I think that is right * * * that is the only letter that I wrote as a letter."

In the face of this unequivocal concession, the District Court took the position that the plaintiff had given the written notice to a licensed agent of the insurance company that was required by the statute, and left to the jury the one issue: whether plaintiff had given that notice as soon as it was practicable for her to do so (170, 281). The jury found for the plaintiff.

The Court of Appeals for the Second Circuit affirmed the judgment entered on the verdict, holding that, although the injured did not give written notice of the accident to a licensed agent of the company (a fact which, as stated earlier, was assumed to be so by the District Court in its submission of the issues to the jury), the judgment was nevertheless right because, under its interpretation of the insurance law, the injured did not have to give such notice.

The result accomplished was this:

a. It was undisputed that the injured did not give any written notice to anyone;

b. It was undisputed that the written notice given by the insured was invalid because untimely as a matter of law;

c. It was thus undisputed that no timely written notice was given to the company by anyone, either by the insured or by the injured;

d. The insurance company nevertheless is being held to cover, although both by contract and statute it was entitled to timely written notice of the accident as a condition of coverage.

## Specification of Errors

The Court below erred in:

1. Failing to dismiss the complaint on the ground that the notice conditions of the policy, both contractual and statutory, were concededly not complied with; and

2. In so construing Section 167 of the New York State Insurance Law as to make timely written notice, uniformly held by the New York courts to be an absolute condition precedent to coverage, unnecessary, although nothing in the statute compels such a construction and the decisional law of New York prohibits such a construction.

## Reasons for Granting the Writ

Rule 38 (5-b) of the Rules of this Court provides that one of the reasons which may be considered for granting a review on a writ of certiorari is "where a Circuit Court of Appeals * * * has decided an important question of local law in a way probably in conflict with applicable local law * * *".

The impact of the present decision on local law in this case is most serious since it affects hundreds of thousands of liability insurance policies in the State of New York, all of which contain the same contractual provisions for timely written notice of an accident as a condition precedent for coverage, and all of which are subject to Section 167 of the New York State Insurance Law.

## Argument in Support of the Above

The law of New York is thoroughly established that failure to comply with the notice conditions of a policy, earlier set forth, is an absolute defense to an insurance company denying coverage for breach of that condition. *Notthelfer* v. *American Surety Company,* 277 App. Div. 1009, aff'd 302 N. Y. 910; *Wetherwax* v. *Royal Indemnity,* 250 N. Y. 281; *Bazar* v. *Great American Indemnity Company,* 306 N. Y. 481.

The rationale of the Court of Appeals in holding that there was coverage even though it was undisputed that

there was no timely written notice of the accident was that the injured did not have to give written notice because the insurance company had already been given a written notice by the insured; that the statute did not intend "to call for a useless ceremonial by the injured person" (R., p. 137).

We submit that this is a wholly unwarranted interpretation of the statute. The statute says there must be notice by the insured OR written notice to a licensed agent of the company by the injured. There must be one or the other. Patently, if neither was given, then the statutory requirements for notice were not complied with.

We have shown that it was conceded that the insured did not give timely notice. It was an invalid notice and hence no notice. We have shown that it was admitted that the injured gave no written notice to a licensed agent of the insurance company. Where, then, was the compliance with either requirement of the statute, *viz.* notice by the insured or written notice by the injured to a licensed agent of the company?

Nor was there any conduct by the injured equivalent to written notice to a licensed agent of the insurance company.

Wiley's transmittal of the claim letter addressed to him and of the summons and complaint served on him, to *his* broker certainly did not constitute notice to the insurance company or to its licensed agent. No proof was made, or even suggested, that Griffith, Wiley's broker, bore any relation to the insurance company so as to make notice sent to him notice to the company, *Clinchy* v. *Grandview Dairy*, 283 N. Y. 39, 43; *Allan* v. *German American Insurance Co.*, 123 N. Y. 6. Griffith was acting for Wiley, and that being so, the notice was Wiley's notice, untimely as a matter of law, and therefore equivalent to no notice at all.

The Court of Appeals agreed with the above, stating (R., p. 137):

> "True, the notice (Wiley's letter) was not 'by or on behalf of the injured person', since Griffith acted not on plaintiff's behalf but on that of Wiley, the injured."

It also agreed that the service of a summons by the injured on Wiley was not a written notice to a licensed agent of the insurance company (R., p. 138).

So that all are agreed that no timely written notice was ever served on the petitioner by anyone.

In *Bazar* v. *Great American Indemnity Company,* 306 N. Y. 481, the latest case in New York involving the construction of Section 167 of the Insurance Law, decided in March, 1954, it was held that the language in the statute (Section 167 of the Insurance Law) "notice by the insured", meant *written* notice to the insurance company as called for by the policy conditions, even though the statute itself does not contain the word "written" in connection with notice by the assured. It was thus held that, in the face of the legislative enactment that as between a policy condition and standard provision the policy must be deemed to contain the one more favorable to the assured, the policy requirements, in so far as form of notice was concerned, controlled. *A fortiori,* when the statute itself says that notice must be written notice "to a licensed agent of the insurance company", the giving of precisely such notice is an absolute prerequisite to coverage. Nothing less can suffice. Admittedly that was not done here, neither directly, nor by equivalent acts.

What the court below has ignored is that Wiley's notice, receipt of which the Court felt excused the need for the injured to give notice, was an invalid notice, *i. e.,* it was in law no notice at all. There is no way of transmuting an invalid notice into a valid one, particularly where neither ratification nor waiver of the invalidity is claimed or urged (130-138). Wiley's invalid notice being

no notice cannot and does form the foundation for any rights based on notice.

Where a statute binds an insurance company with notice given by a stranger to the insurance contract, the least that the insurance company is entitled to is a full compliance by such a one with the requirements imposed upon him by the statute. He who seeks to rely on a statute must first comply with the statute.

The requirements for timely written notice to a licensed agent of an insurer is not a picayune technicality. It is the product of bitter experience that that is the only way that an insurer can be protected from unverified and unverifiable claims that notice of an accident had been given to it.

There was here a conceded total failure to comply with either statutory method of giving notice. The construction of the statute by the Court below, without cause, vitiates the notice requirements of every liability policy in the State of New York. The ruling presents a matter of sufficient moment to be reviewed by this Court.

## Conclusion

Petitioner respectfully submits that this petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

William S. O'Connor,
Counsel for Petitioner.

Benjamin H. Siff,
Of Counsel.

# APPENDIX

**Opinion by United States Court of Appeals for the Second Circuit.**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 48 OCTOBER TERM, 1954

Argued October 4, 1954 Decided December 8, 1954

DOCKET No. 23135

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RUBY MAE PITTS,

Plaintiff-Appellee,

*v.*

THE AETNA CASUALTY & SURETY COMPANY,

Defendant-Appellant.

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Before:

CLARK, Chief Judge, and L. HAND and FRANK, Circuit Judges.

Appeal by defendant from a judgment, on a jury verdict, by the United States District Court for the Southern District of New York, Dimock, Judge. AFFIRMED.

JULES CHOPAK for plaintiff-appellee.

WILLIAM S. O'CONNOR (Benjamin H. Siff, of counsel) for defendant-appellant.

FRANK, Circuit Judge:

On August 6, 1952, plaintiff was injured when struck by an automobile. Discharged from the hospital on August 14, 1952, she retained Jules Chopak as her lawyer. His

investigation disclosed that Hartford Wiley owned and had operated the automobile which struck the plaintiff. On September 4, 1952, Chopak sent Wiley a letter advising him of plaintiff's claim. Receiving no response, Chopak sent Wiley a similar letter on September 9, 1952, and again received no response.

The Aetna Casualty & Surety Company, on December 29, 1951, had issued an accident policy to Wiley covering his liability to others in automobile accidents, up to the amount of $10,000; this policy was in force when the accident in question occurred. On September 11, 1952, Griffith, an insurance broker who represented Wiley, sent the insurance company a letter notifying it of plaintiff's claim.[1] On either September 11 or September 17, the company received this letter together with Chopak's claim letter.

On September 17, 1952, plaintiff began suit against Wiley, in the New York Supreme Court, by serving him with a summons and complaint. The complaint stated the date of the accident and the nature of plaintiff's resultant injuries. On September 19, 1952, the company received from Griffith the plaintiff's summons and complaint.

On September 23, 1952, an employee of the company phoned Chopak, inquiring about plaintiff's claim; in an-

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[1] The letter reads as follows:

"Re: #ICA204366 H Wiley
Accid 8/6/52

"Gentlemen:

Please be inform of the following claim for Auto damages.

Ruby Mae Pitts represented by
Atty Jules Chopak—261 B'way., N. Y. C.

This claim is for Bodily injuries sustained by The Claimant due to a accident on 138 St. Lenox Ave.—8/6/52

Hartford Wiley—5 E. 118 Street, N. Y. C.—ICA 204366

Your immediate attention to the adjustment of this claim will be greatly appreciated."

swers to questions, Chopak then orally gave the company's employee the details of the accident. Until that telephone conversation, neither Chopak nor plaintiff knew of the insurance policy. On October 7, 1952, the company wrote Griffith a letter disclaiming liability under the policy because no notice of the accident had been given to the company until September 11, 1952, although the accident had occurred on August 6, 1952.

In plaintiff's suit against Wiley, a judgment for plaintiff was entered on May 6, 1953, in the sum of $7,702.13. On the same day, plaintiff served Wiley and the insurance company a copy of that judgment with notice of its entry. The judgment was not paid.

On June 12, 1953, plaintiff began the present suit against the insurance company in the New York Supreme Court; the complaint was based on Section 167 of the New York Insurance Law. The case was removed to the court below. At the close of the trial, the judge instructed the jury that it must consider that plaintiff "had given notice of the accident to defendant insurance company on the day it [the defendant] got notice from Wiley's broker, which was either on September 11 or September 17, 1952." The judge charged that the sole question for the jury was whether plaintiff did "as soon as reasonably possible after the accident, notify the defendant insurance company of the accident. * * * The accident happened on August 6, 1952. So that your question is whether it was reasonably possible for Mrs. Pitts and those representing her to notify the company between that date and the date when the insurance company received the notice from Wiley's broker." The jury returned a verdict in plaintiff's favor for $7,702.31 with interest, or $8,106.66. From the judgment in that amount, entered on the verdict, defendant appeals.

The pertinent parts of § 167 of the New York Insurance Law read as follows:

"1. No policy or contract insuring against liability for injury to person, except as stated in subsection three, or against liability for injury to, or destruction of, property shall be issued or delivered in this state, unless it contains in substance the following provision or provisions which are equally or more favorable to the insured and to judgment creditors so far as such provisions relate to judgment creditors: * * *

"(b) A provision that in case judgment against the insured or his personal representatives in an action brought to recover damages for injury sustained or loss or damage occasioned during the life of the policy or contract, shall remain unsatisfied at the expiration of thirty days from the serving of notice of entry of judgment upon the attorney for the insured, or upon the insured, and upon the insurer, then an action may, except during a stay or limited stay of execution against the insured on such judgment, be maintained against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract.

"(c) A provision that notice given by or on behalf of the insured, or written notice by or on behalf of the injured person or any other claimant, to any licensed agent of the insurer in this state, with particulars sufficient to identify the insured, shall be deemed notice to the insurer.

"(d) A provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured or by any other claimant thereunder if it shall be shown not to have been reasonably possible

to give such notice within the prescribed time and that notice was given as soon as was reasonably possible."

The policy issued by defendant contained this provision: "When an accident occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable."

FRANK, Circuit Judge:

1. Section 167(d) of the statute provides that "failure to give any notice required by the policy within the time prescribed therein shall not invalidate any claim made by the insured or by any other claimant thereunder if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible." On September 11 or September 17, 1952, or at most 42 days after the accident, the company received written notice from Wiley's broker. Assuming for the moment that this notice sufficiently complied with § 167(c), we think that the jury was not irrational in finding as it did.

2. We think the written notice from Wiley's broker satisfies the requirements of § 167(c). True, the notice was not "by or on behalf of the injured person," since Griffith acted not on plaintiff's behalf but on that of Wiley, the insured. We think, however, that the statute in using the disjunctive "or"—in the words "by or on behalf of the insured or * * * by or on behalf of the injured person"—does not require the injured person to give written notice, when one had already been given by or on behalf of the insured. The legislature, we think, intended to provide (a) that the insured company should receive written notice

and (b) that, if the insured failed to give written notice, the injured person must do so. We cannot believe that the legislature meant to call for a useless ceremonial by the injured person. In *Bazar* v. *Great American Indemnity Company*, 306 N. Y. 481, 119 N. E. (2d) 346, as we read it, the court held that, had the insured given written notice, the injured person, although he gave no notice, could have recovered against the insurance company.[2]

3. Defendant argues that here, so far as Wiley, the insured, was concerned, his written notice was not timely either under § 167(d) or under the provisions of the policy, and that therefore that notice could not serve as a substitute for a timely written notice by plaintiff, the injured person. The trial judge supplied the answer to that

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[2] The court held that, although Sec. 167(c) speaks of "notice given by or on behalf of the insured" but speaks of "written notice" on behalf of the injured persons, a provision of an insurance policy calling for written notice by the insured is valid.

In the instant case, the trial judge in his charge said that "The insurance company had not only received a notice from Wiley's broker, but the summons and complaint which gave it complete notice of the accident." Bazar v. Great American Indemnity Co., 306 N. Y. 481, 119 N. E. (2d) 346, perhaps holds that the summons and complaint do not constitute written notice by or on behalf of the insured to the insurance company. But even if, as to the summons and complaint, the trial judge here erred, the error is immaterial since the written notice from Wiley's broker was alone enough, and the jury was not misled since this issue was not left to the jury.

The court in the Bazar case did not reach what was the main issue in the instant case: whether or not the injured party gave notice to the insurance company "as soon as reasonably possible after the accident." It would have been futile for the Bazar court to consider that question, for Bazar, the injured party, did not give notice to the company until twenty-nine months after the accident, which was not "as soon as reasonably possible," since he made no effort to determine whether the automobile which struck him was insured, and apparently learned of it, not through his own efforts, but by a telephone call from an agent of the insurer some twenty months after the accident.

argument in his charge to the jury, when he said: "[E]ven if you think that such a delay on the part of Mr. Wiley, the insured, to give notice would have been unreasonable, that would not answer the question before you. The question with respect to Mr. Wiley is entirely different because he was confronted with different circumstances from those which confronted Mrs. Pitts. The most important of these is that he knew that he was insured. Mrs. Pitts and her lawyer did not know about the insurance until after they had brought suit. * * * The injured person has to have a reasonable time to find out who injured him and then ascertain from the person who injured him, as best he can, whether he is insured and, if so, the name and address of the insurance company."[3]

AFFIRMED.

L. HAND, Circuit Judge (concurring):

I concur; but I am in more doubt than my brothers about the scope of *Bazar* v. *Great American Indemnity Company*, 306 N. Y. 481. I am disposed to confine it to a ruling that notice, if given by the insurer, as well as if given by the injured party, must be in writing. On the facts the decision seems to have gone further; for it held that a delay by the insured to give notice defeated recovery by the injured party, who, so far as appears, was not dilatory after he learned of the insurance; but it is so unlikely that the injured person should be vicariously charged with the insured's delay that we may safely believe the decision to be limited to the point I mention.

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[3] It is suggested that the oral disclosure by plaintiff's lawyer to the company on September 23, 1952, may be regarded as a sort of adoption on plaintiff's behalf of the previous written notice, given on behalf of the insured. But we do not consider that suggestion because the judge did not leave to the jury the question whether a notice as late as September 23 was timely.

## Judgment.

UNITED STATES OF AMERICA
U. S. DISTRICT COURT, S. D. OF N. Y. } ss.:

U. S. Dist. Ct.
Jan. 6, 1955

THE PRESIDENT OF THE UNITED STATES OF AMERICA
To the Honorable Judge of the United States District Court for the Southern District of New York

GREETING:

WHEREAS, lately in the United States District Court for the Southern District of New York, before you, or some of you, in a cause between Ruby Mae Pitts and The Aetna Casualty & Surety Company a judgment was entered in the office of the Clerk of said Court in the words and figures following to wit:

The issues in the above entitled action having been brought on regularly for trial before the Hon. Edward J. Dimock and a jury on March 22 and 23, 1954, and the jury having rendered a verdict in favor of the plaintiff, it is

Adjudged: That the plaintiff have judgment against the defendant for the sum of $8,106.66.

Dated, New York, March 24, 1954.

WILLIAM V. CONNELL,
Clerk.

March 24, 1954, Plaintiff's costs taxed at $20.00.

WILLIAM V. CONNELL,
Clerk.

Filed
U. S. District Court
S. D. of N. Y.
Mar. 24, 1954

*Judgment.*

AND WHEREAS, in the present Term of October, in the year of Our Lord one thousand nine hundred and fifty-four, the said cause came on to be heard before the said United States Court of Appeals for the Second Circuit, on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the said judgment of said District Court be and it hereby is affirmed.

Further ordered that interest calculated under Rule 26 (a) of the rules of this Court be allowed to the appellee.

You, therefore, are hereby commanded that such further proceeding be had in said cause, in accordance with the decision of this Court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS, the HONORABLE EARL WARREN, Chief Justice of the United States, the 3rd day of January, in the year of Our Lord one thousand nine hundred and fifty-five.

A. DANIEL FUSARO,
Clerk of the U. S. Court of Appeals
for the Second Circuit.

(SEAL)
United States
Second Circuit
Court of Appeals

## Sec. 167. Liability Insurance.

Sec. 167. *Liability insurance; standard provisions;* right of injured person.—1. No policy or contract insuring against liability for injury to person, except as stated in subsection three, or against liability for injury to, or destruction of, property shall be issued or delivered in this state, unless it contains in substance the following provisions or provisions which are equally or more favorable to the insured and to judgment creditors so far as such provisions relate to judgment creditors:

(a) A provision that the insolvency or bankruptcy of the person insured, or the insolvency of his estate, shall not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of and within the coverage of such policy or contract.

(b) A provision that in case judgment against the insured or his personal representative in an action brought to recover damages for injury sustained or loss or damage occasioned during the life of the policy or contract, shall remain unsatisfied at the expiration of thirty days from the serving of notice of entry of judgment upon the attorney for the insured, or upon the insured, and upon the insurer, then an action may, except during a stay or limited stay of execution against the insured on such judgment, be maintained against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract.

(c) A provision that notice given by or on behalf of the insured, or written notice by or on behalf of the injured person or any other claimant, to any licensed agent of the insurer in this state, with particulars sufficient to identify the insured, shall be deemed notice to the insurer.

(d) A provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured or by any other claimant thereunder if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible.

7. Subject to the limitations and conditions of subsection one, paragraph (b), an action may be maintained by the following persons against the insurer upon any policy or contract of liability insurance which is governed by said paragraph (b), to recover the amount of a judgment against the insured or his personal representative.

(a) Any person who, or the personal representative of any person who, has obtained a judgment against the insured or his personal representative, for damages for injury sustained or loss or damage occasioned during the life of the policy of contract. • • •

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IN THE

# Supreme Court of the United States

October Term, 1954

No. 634

THE AETNA CASUALTY & SURETY COMPANY,

*Petitioner,*

—against—

RUBY MAE PITTS,

*Respondent.*

## RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March 8, 1955

# INDEX


PAGE

Question Presented ..... 3

Statement of Facts by Petitioner Are Not Correct .... 5

No Reason for Granting the Writ Exists ..... 11

Argument Against Granting the Writ ..... 12

Salient Excerpts from Views of Two Courts Below .... 16


CITATIONS:

*Cases*:


Bazar v. Great American Indemnity Co., 306 N. Y. 481 ..... 9, 12

Birnbaum v. Jamestown Mutual Insurance Company, 298 N. Y. 305, 301 N. Y. 516 ..... 4

Fischer v. U. S., 328 U. S. 463 ..... 14

Great Atlantic v. Supermarket, 340 U. S. 147 ..... 14

Greenwich v. Hartford Fire Ins. Co., 250 N. Y. 116 .... 4

Huddleston v. Dwyer, 322 U. S. 232 ..... 14

Joe Lee v. Aetna Casualty and Surety Company, 178 F. 2nd 750 ..... 5

N. L. R. B. v. Pittsburgh, 340 U. S. 498 ..... 14

N. L. R. B. v. Pittsburgh, 340 U. S. 503 ..... 15

PAGE

Palmer v. Hoffman, 318 U. S. 109 ..... 14
Phoenix Indemnity Co. v. Anderson's Grove, U. S. Court of Appeals, 176 F. 2nd 246 ..... 4

Rushing v. Commercial Casualty Co., 251 N. Y. 304 .... 4, 7

Solomon v. Continental Fire Ins. Co., 160 N. Y. 595, 598 to 600 ..... 4
Stein v. People of the State of New York, 346 U. S. 181 15

Zauderer v. Continental Casualty Company, U. S. Court of Appeals, 140 F. 2nd 211, 214 ..... 4

*Other Authorities*:

N. Y. State Insurance Law 1909, chap. 33 (section 109) omended, 1917, chap. 524 *repealed,* 1939, chap. 882 at sec. 600 ..... 12

N. Y. State Insurance Law,

Sec. 143(1) ..... 5, 12

Secs. 167 and 167(d) ..... 4, 5, 11, 12, 13

Revised Rule 38(5-b) (1941) ..... 2

Present Rule 19(b) 1954 ..... 2

United States Constitution, Article 1, Section 10, Clause 1 ..... 1, 2
U. S. C. A., Title 28, pp. 60-62 ..... 14

IN THE

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THE AETNA CASUALTY & SURETY COMPANY,

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—against—

RUBY MAE PITTS,

*Respondent.*

## RESPONDENT'S BRIEF OPPOSING GRANTING THE WRIT

The Respondent respectfully opposes this application for a Writ and asks that it be denied.

The Respondent believes that, if the Petitioner had had to make the application for a stay to a Justice of this Court, the learned Justice would not have granted it.

When the Petitioner was defeated by the Court of Appeals by an affirmance of the Jury verdict, and made its application for rehearing relief, it urged to that court *as a ground,* that the statute which enabled it to write this policy of insurance, and for which it took the premium money as consideration for the contract, *impaired the obligation of its contract and violated the protection afforded to it by the United States Constitution, Article 1, Section 10, clause 1.*

Then, when the Respondent was free to execute on the judgment and to collect the money which a Jury of its

peers said she should have, as approved by the Court of Appeals, the Petitioner went to the District Court for a stay. It again reasoned with that Court and urged as a ground that the construction of the statute was *"to abrogate and impair the insurance company's contractual right to a timely written notice, an impairment of rights violative of Article 1, Section 10, Clause 1 of the Constitution of the United States,"* and it continued, *"Deponent respectfully submits* that as a result of the judgment and decision of the United States Court of Appeals, in this case, *a constitutional question has been raised which should be decided by the Supreme Court of the United States."*

So when the Petitioner achieved its stay by such representation, it turned about and completely abandoned the very argument which probably enabled it to now apply for a Writ.

The Respondent does not believe that the Petitioner is acting in good faith or with sincere intentions but just grasping upon straws to manifest its disappointment and disgruntlement.

In asking this Court to intervene, it even is proceeding under Rule 38(5-b) of Rules in effect in 1941 as to "an important question of local law in a way probably in conflict with applicable local decisions," whereas, since this judgment was an actuality between March and December 1954, the application could be made only through the Revised Rules adopted in April and effective on July 1, 1954, and which would consider that the Court of Appeals "decided an important state question in a way in conflict with applicable state law." Yet all the court below did was to affirm a Jury verdict.

There is no evidence in the record whatever that this case is more than an isolated one of an indigent woman, a

public charge of the Welfare Department (R., p. 15) who had suffered a fractured pelvis (R., p. 77); "it became obvious that an injury of a possibly serious nature was involved" (R., p. 63); who had been hospitalized for it (R., p. 15) and for which injury she was awarded only $7,500. as damages (R., p. 115), which became only $8,106. in the United States Court after a year, and which is that amount, plus interest, after 2 years.

There is not a *scintilla* of evidence—no proof of any kind whatever—that "hundreds of thousands" of liability insurance policies in New York State are involved. The statement is wild and provocative, exaggerated and misleading on its face.

If there were the slightest truth to such assertion, the subject would have appeared in the books many times between the year 1939, when the statute was enacted, and before 1952, when this case was caused to exist.

## Question Presented

The case, reduced to its simple structure, is one of a litigation between an injured person on the one hand, who was given rights to money damages as compensation by a statute of the State, and also by a closing paragraph of the insurance policy itself (last page of Ex. 10, R., pp. 116-117), and an insurance company, on the other, who promised in writing to defend and to pay in consideration of a money premium collected in advance. To collect the money, she had to submit herself to a Jury of the peers of the parties and to convince them, which she did.

The statute was such (it had liberalized a former statute which had been repealed) that she could make her claim, after she procured a judgment on the merits for her injury, for which she had not yet been compensated, any time after

the occurrence, provided it was "shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as *reasonably possible* (*N. Y. State Insurance Law, Sec. 167(d)*).

See, *Rushing* v. *Commercial Casualty Co.*, 251 N. Y. 304, where the New York Appeals Court allowed for delay of notice without impairing recovery, and also examples of delayed notice, which were accepted by the New York Appeals Court, in *Greenwich* v. *Hartford Fire Ins. Co.*, 250 N. Y. 116; and *Solomon* v. *Continental Fire Ins. Co.*, 160 N. Y. 595, 598 to 600.

The Respondent was then put to the burden of making her proof that it was not reasonably possible to have given the notice sooner and that she did give the notice, when she could, before a Jury of the peers of the parties. The proof appears at great length in the record now before the Court at printed pages 13 to 45; folios 37 to 135, together with Respondent's Exhibits 1 to 13, inclusive.

It is not new in United States Courts that reports of automobile accidents, "notice," etc., under policies were *fact questions* for the triers of the facts and, here, the Jury.

See *Zauderer* v. *Continental Casualty Company*, U. S. Court of Appeals, 140 F. 2nd 211, 214 and *Phoenix Indemnity Co.* v. *Anderson's Grove*, U. S. Court of Appeals, 176 F. 2nd 246.

A leading New York State case on automobile liability insurance which was twice tried before *juries on the fact issues* was *Birnbaum* v. *Jamestown Mutual Insurance Company*, 298 N. Y. 305 and 301 N. Y. 516.

Once the insured had an accident, in which, when operating his automobile, he injured the Respondent, the insurance company was bound to defend the suit (*Joe Lee* v.

*Aetna Casualty and Surety Company,* 178 F. 2nd 750, *this Petitioner*) and to pay, if damages were awarded, by the terms of the Insurance Law, which enabled it to do the business upon the conditions set forth in the law.

This is found in the act itself. Sec. 143, 1, bound the policy as valid and binding on the insurer and held it enforceable as the statute provided. Section 167, 1, required clauses (a) to (d), inclusive, to be expressly written into the policies in substance, if no more, which would then be more favorable to judgment creditors (than to insurance companies by reading of the statute).

Nothing of the nature of clauses (b), (c) and (d) of the act were stated in the policy. The Respondent could learn of these only by independent research of the statute through her lawyer, when, she, through her lawyer, learned that there was insurance.

**Statement of Facts by Petitioner Are Not Correct**

Respondent does not agree that "the facts are not disputed." The facts were *disputed.*

It was required that Respondent make a *prima facie* case to withstand the motion to dismiss (R., fols. 136, 144, 156, 157, 162, 164, 165, 172 to 176, inclusive, and 179). Thereafter, Petitioner put in a defense upon the disputed issues (R., pp. 60 to 85, inclusive). Renewed motion at the close of the whole case was denied at R., p. 86 and the case was sent to the Jury on the *disputed* issues (R., p. 85). Respondent's Requests to Charge, R., pp. 87 to 92, inclusive, and Petitioner's Requests on R., p. 93 bore on the facts in issue or on the facts in *dispute.*

There was no statutory or other New York State requirement as to the form or content of the notice of the accident

(except that under Section 1(c) particulars *to identify the insured* were required); nor by whom to be made; nor when in point of unit days or period to be made. It could well be by the Summons and Complaint (R., p. 56). It was made by the insured's broker as "on behalf of the injured person or any other claimant" when he wrote DIRECTLY to the insurance company at their New York address as information to "any licensed agent," Defendant's (Petitioner's) Exhibit B, R., p. 127; fols. 379 to 381. This was "on behalf" of the injured woman. Defendant's (Petitioner's) witness confirmed the unnecessary form and detail in his testimony at R., p. 61, fols. 182, 183. Petitioner's defending witness testified: "On September 19, 1952, we received first *notice of claim* from A. Basil Griffith. Who is this A. Basil Griffith, if you know? A. From his letterhead, apparently he is an insurance broker" (R., p. 61; fol. 183). Accordingly, he not necessarily notified exclusively on behalf of the insured, but he gave a notice to the insurance company *direct* to its New York office, which on its face was "on behalf" of the injured person. This was Petitioner's (Defendant's Exhibit B, R., p. 127).

As to there being no special requirement as to form and content, see Petitioner's testimony, R., p. 73, fol. 219; 75, fol. 225, p. 76, fols. 226, 227; 80, fols. 240, 241.

The Petitioner's only witness, Clifford Lucia, testified that no special phraseology or form was required, and that the notice was given in a variety of ways (R., fols. 240-241). "Q. And have you in your experience known of a great number of varying communications, all of which you regarded as notices of claim and claim letters? A. Yes."

No where by statute or decision law, was it required specifically that the injured person's *lawyer* should write the claim letter or, when writing, to the insured, and not knowing if he was insured or the name of his company,

that the *lawyer* had to caution the insured to send the letter to the insurance company, if he was insured. He might not have been insured. The lawyer might not know the fact.

Besides the "notice letter," there came into the hands of the Petitioner, a copy of the insured's Motor Vehicle Bureau Report, in writing, Respondent's (Plaintiff's Ex. 13, R., p. 124), which gave fullest particulars.

Besides the "notice" letter and the Motor Vehicle Report, there came into the hands of the insurance company, Respondent's "claim letter," Respondent's (Defendant's) Exhibit A, R., p. 126.

Besides the foregoing documents, there came into the hands of the insurance company, Respondent's summons and *verified complaint* in the action which detailed "Notice" far in excess of all requirements (R., pp. 109 to 111, and 120 to 122, Plaintiff's Exs. 6 and 12).

So, for an accident on August 6th, with writings delivered in September, the case never came to trial before the following April. This gave the insurance company plenty of time to serve in the case.

Contrary to the assertion in the Petitioner's Brief at page 4, there is not a scintilla of evidence in the record at folios 190 and 191 or anywhere else that "it was ascertained that there was no excuse for his (insured's) complete failure to notify the insurance company." That statement is very much disputed. As the New York Court of Appeals said in the *Rushing* case: "There may, indeed, be *circumstances* such as the absence from the State or lack of knowledge of the accident, which allowed for explanation and excuse." For aught that it appears, the insurance company's action was wilful and arbitrary, and an effort to dodge defending or escape an eventual payment in a "serious" injury case—of known fractured pelvis, hos-

pitalized; and the resultant disclaimer was sought to become a loophole.

Nothing is established what excuse Wiley, the injured gave. Nothing is shown of any prejudice or harm. Nothing is shown of what contribution was made by the insurance company to the delay, including a grossly ambiguous demand for notice which contravened and violated the statute. Nothing was shown of what independent knowledge the insurance company had of its own motions and records.

"The basic issue in this case" (Petitioner's Brief, p. 4), is not whether the policy notice conditions were complied with, but whether the Respondent gave notice as soon as she reasonably could, and did do so in the manner that she did, which could be decided by the Jury only and was so decided by the Jury only.

Respondent did not "fully appreciate" that the insured's "unexcused failure" (this is disputed) to give notice was a fatal breach, etc., under the New York law.

The Respondent simply ignored the insured, his duties, obligations and promises. He was no client or agent of Respondent, nor her attorney. The statute was *disjunctive.* It gave "or" rights and rights to her independently of him. As a matter of fact, had she worked in harmony, he might have been accused of non-cooperation and thus invited or incurred a disclaimer.

The rights of each were neither conditioned nor concurrent. They were strangers to each other as well as opponents.

Because Respondent's lawyer did not write a letter or give written advice to the insured to notify his insurance company (no duty and no condition precedent), the Petitioner blows up the attorney's testimony on brief, page 5.

The attorney, to have said in that letter: "Turn this letter over to your insurance company," would have prejudiced the case to the Jury upon *original* negligence suit, in the event that the letter would have been needed as proof or offered into evidence. The use of the word "insurance" in it would have been ground to exclude it from the proof, if and when needed.

But what about Griffith's letter, the Motor Vehicle Report, and the verified complaint as *information,* since no form or substance of notice was required by statute, except to give the name of the insured?

If there was any doubt as to whether the Respondent was free to give her notice, independently of the insured, the following quotation taken from the decision by the New York Court of Appeals in April 1954, in the case of *Bazar* v. *Great American Indemnity Co.,* 306 N. Y. 481, should settle the doubt, when it did, it said in part:

> "Former section 109 was one of the parts of the Insurance Law which was carefully scrutinized when the insurance department and a legislative commission conducted an elaborate study and revision, of the Insurance Law in 1938. Before the 1938 revision, old section 109, which, as revised, became present section 167, said nothing about any notice by the injured person, but authorized a policy requirement 'that notice given by or on behalf of the insured to any authorized agent of the insurer in this state, with particulars sufficient to identify the insured, shall be deemed to be notice to the insurer.' One of the changes suggested by the revisers in the 'Second Draft' of the 1938 revision was that *the policy provision should set up a method whereby the injured person, too, could give an appropriate notice to the company.* In its original form that proposed addition did not specify that a

notice be given by the injured person or claimant should be in writing. However, a memorandum presented to the revisers by 'The Association of Casualty and Surety Executives,' in which memorandum the insurers objected to any mention of a notice by a claimant, said, also, that it was not clear to the underwriters what kind of notice the revisers intended should be given by an injured person or other claimant. In that memorandum on behalf of the insurers, it was pointed out to the revisers that liability policies generally provided (then as now) that written notice must be given by the insured to the insurer or agent as soon as practicable. In other words, the insurers reminding the revisers that, under old section 109, the policies required written notice by the insured, objected to any new statutory provision for a notice by the injured person, and said, further, that the proposed revised statute did not say what kind of notice from an injured person would be sufficient. The minutes of a public hearing held by a Joint Legislative Committee in Albany on November 18, 1938, contain a colloquy between the chairman of the insurance department's committee on insurance law revision and a spokesman for the casualty companies. *The carriers' representatives argued against any provision as to notice by an injured person,* but said that if there was to be such a provision it should require 'written notice' by the claimant, just as the policies required from the insured. *For the insurance department, it was explained that the revisers had in mind certain supposed cases where an insured for some reason might not give notice to the company, but where the injured person might give the insurer notice, and that the revisers were willing to provide that, if the insured gave no notice, notice from the injured person would be re-*

*quired to be in writing. Thus, all concerned were talking about the new proposed statutory law to the effect that notice requirements would be satisfied by the injured person giving a notice to the company when the insured had given no notice."*

It once was the New York State Law that an injured person could get no relief if the insured went into bankruptcy or was not legally pursued until all legal remedies against him were exhausted, or if he did not give "immediate" notice to the insurance company, or if he alone did not give the notice as soon as practical, on the theory that there was no privity of contract between the insurance company and the injured person. But that was all dispensed with by the present Insurance Law, more particularly Section 167 and subdivisions.

**No Reason for Granting the Writ Exists**

The Court of Appeals made no error in adopting the Jury verdict on the facts, and confirming on the law. It was the Jury's sole function to determine if what Respondent did conformed to the law.

There is no question of state law decided in conflict with applicable state law as a reading of the statute itself and the state court's own decisions herein briefed show. There may be a dearth of litigation; but that scarcity may be due to the clarity of the statute or the absence of necessity for such litigation.

**Argument Against Granting the Writ**

Much argument, on the merits, against granting the Writ, appears hereinabove, in the discussion of the facts, which were disputed.

However, at this point, this Honorable Court should be informed also, that none of the cases used in the petitioning brief, *except* the *Bazar* case, are now effectual, and that they have no force of law, since they were decisions (a) *construing a statute which was repealed* and not reenacted as amended. The legislature wrote a new statute simultaneously with the repeal; (b) or one case was a notice 11 months after the accident; or (c) another did not consider that the injured person had any right at all to give notice; and (d) decided other propositions.

As the phraseology of the terms in this suit was not passed upon by the state courts in those decisions and as those decisions construed verbiage which is not embraced within this suit, all those cited cases, except the *Bazar* case, are totally irrelevant.

The Petitioner's citations passed upon New York State statutes 1909, chap. 33 (section 109); amended, 1917, chap. 524; *repealed in 1939, chap. 882* at sec. 600, or even earlier statutes. The cited cases refer to decisions made as early as October 7th, 1890, whereas the statute now under consideration became enacted only in June, 1939.

But, when this new law was enacted, which contained new sections 143 and 167, both with subdivisions, then in that same statute, at section 600, all those former statutes were simultaneously repealed and with the repeal went out of function the authority of the decisions made thereunder.

Under Section 143(1), the policy *was enforceable against the insurance company,* however much it did not comply

with the Insurance Law, and under Section 167, the policy was required to specifically state "in substance the following provisions which are equally or more favorable to the insured and to judgment creditors," the clauses 1 (b), (c) and (d), *which it did not.*

If it develops that the insurance company issued illegal or non-conforming to the law policies and thus committed such wrong, it should not be condoned nor benefitted by such wrong.

The Petitioner repeats and reiterates in many forms and instances, *contrary* to the Rules of this Court, that the Respondent "admits," "concedes" and time and again the court below and other related individuals "agreed" to propositions which it argues as if those argued propositions were really the accepted. Nothing is further from the truth. The suggestions of that nature are only the Petitioner's argument and hope that this Court will see it at one place, if escaped in another.

The Respondent does not wish to be drawn into such error.

The Respondent was entitled to give timely notice, *delayed,* until she could learn who was the insurance company independently and not conditions, concurrent, in conjunction, or in collaboration with the insured; to give it in any form or content by any person in her behalf in writing, which she did, and then whatever she did or did not do was all factual for the Jury of the peers who did decide them in her favor. Under the statute as now constituted, it was unimportant to her, if the insured gave no notice at all. Under the old statute, not only was that a consequence, but she had no power at all to give a notice. If the insured maliciously or deliberately refrained from giving notice, she was then thus defeated right at the start. That is no longer the law.

On June 15, 1939, the Insurance Law of New York State was liberalized to right many wrongs, and to correct many defeats to damages, which the Petitioner, at first, thought it would say to this Court impaired their constitutional rights to their contract and then abandoned that thought, when, doubtless on reflection, it seemed so foolish. Because of this expanded new law, this Respondent came into a remedy.

Doubt raised by state court decisions should not be resolved by the Supreme Court on certiorari.

*Huddleston* v. *Dwyer,* 322 U. S. 232.

Where the conclusions of the Court of Appeals depend on appreciation of circumstances which admit of different interpretation, the Supreme Court will not interfere.

*N. L. R. B.* v. *Pittsburgh,* 340 U. S. 498.

Nor undertake to review concurrent findings of fact by two courts below in the absence of very obvious and exceptional showing of error.

*Great Atlantic* v. *Supermarket,* 340 U. S. 147.

Nor undertake to set aside the lower federal courts in applying of the local law, except on plain showing of error.

*Palmer* v. *Hoffman,* 318 U. S. 109.

Nor only where there is egregious error.

*Fischer* v. *U. S.,* 328 U. S. 463.

Concurrent findings of fact by two courts below will not ordinarily be disturbed.

See, numerous citations and summaries upon this point in U. S. C. A., Title 28 at pages 60 to 62 inclusive.

Quotations from two decisions of the Supreme Court, one of which is cited above, are appropriate to this litigation.

In *N. L. R. B.* v. *Pittsburgh,* 340 U. S. point 4 at page 503, this Court said:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals, because were we in its place, we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony, where on a conscientious consideration of the entire record, a Court of Appeals under the new dispension finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference, where conclusions of the Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' Fed. Trade v. American, 274 U. S. 543."

In *Stein* v. *People of the State of New York,* 346 U. S. 181, which was a criminal case, at Point 20, this Court said:

> "Of course, this Court cannot allow itself to be completely bound by the state court determination of any issue essential to decision of a claim to federal right, else federal law could be frustrated by distorted fact finding; but that does not mean that we give no weight to the decision below, or approach the record *de novo* or with the latitude of choice open to some state appellate courts, such as the New York Court of Appeals. • • • It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if

they do, that cause us to intervene to review in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a State Court.

**Salient Excerpts from Views of Two Courts Below**

The Trial Court in his Charge said:

"Liability insurance policies usually require that reasonable notice of the accident be given to the insurance company. The law permits that notice to be given either by the insured person or some person who has been injured.

"The only question that has to be decided in this case by you is a very simple one—, did the injured person, Mrs. Pitts, as soon as reasonably possible after the accident, notify the defendant insurance company of the accident? * * *

"The uncontradicted testimony is that by the time that her attorney learned that there was insurance in the case, the insurance company had not only received a notice from Wiley's broker, but the summons and complaint which gave it complete notice of the accident. * * *

"To help you, I must tell you that even if you think that such a delay on the part of Mr. Wiley, the insured, to give notice would have been unreasonable, that would not answer the question before you. The question with respect to Mr. Wiley is entirely different because he was confronted with different circumstances from those which confronted Mrs. Pitts. The most important of these is that he knew that he was insured. Mrs. Pitts and her lawyer did not know about the insurance until after they had brought suit. * * *

"BUT THE INJURED PERSON HAS TO HAVE A REASONABLE TIME.

"But the injured person has to have a reasonable time to find out who injured him and then ascertain from the person who injured him as best he can, whether he is insured, and, if so, the name and address of the insurance company."

The Court of Appeals said in part:

"Assuming for the moment that this notice sufficiently complied with Section 167(c), we think that the jury was not irrational in finding as it did.

2. We think the written notice from Wiley's broker satisfies the requirements of Section 167(c).

* * * * *

"We think, however, that the statute in using the disjunctive "or"—in the words "by or on behalf of the insured or * * * by or on behalf of the injured person" —does not require the injured person to give written notice, when one had already been given by or on behalf of the insured. The Legislature, we think, intended to provide (a) that the insured company should receive written notice and (b) that, if the insured failed to give written notice, the injured person must do so. We cannot believe that the Legislature meant to call for a useless ceremonial by the injured person."

The Petition should be denied.

Respectfully submitted,

JULES CHOPAK
*Counsel for Respondent*

March 8, 1955